Nos. 618, 676, 704, 743.

FILED

APR 15 193

CHARLES ELMORE CR
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA EX REL. ETHEL M. MCLENNAN, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

UNITED STATES OF AMERICA EX REL. ROY G. BARTON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES OF AMERICA EX REL. W. B. PYRON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF WYOMING, COLORADO, UTAH, MONTANA AND NEW MEXICO.

STATE OF WYOMING,
By: J. A. Greenwood,
Its Attorney General.
STATE OF COLORADO,
By: Clarence L. Ireland,
Its Attorney General.
STATE OF MONTANA,
By: L. A. Foot,
Its Attorney General.
STATE OF UTAH,
By: George P. Parker,
Its Attorney General.
STATE OF NEW MEXICO,
By: E. K. Neumann,
Its Attorney General.

OF COUNSEL:
PETER Q. NYCE.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

SUBJECT INDEX.

Page

Executive Authority to Withdraw from Private Appropriation Portions of the Public Domain 11

Conservation of Oil and Gas by Congress 14

TABLE OF CASES CITED.

Fairbanks v. U. S., 181 U. S. 283, 45 L. Ed. 862. 13

Haynes v. Smith, 50 L. D. 208 9

Kendall v. U. S., 12 Peters 612, 9 L. Ed. 1216.... 10

U. S. v. Midwest Oil Co., 236 U. S. 459, 59 L. Ed. 681 13

Utah v. Lichliter, 50 L. D. 236 13

Wilbur v. Krushnic, 280 U. S. 306 12

ACTS CITED.

Act of March 4, 1931, Public No. 853, 71st Congress 14

Leasing Act, Sec. 32 9

PUBLIC DOCUMENTS CITED.

Statements by Mr. Mondell:

Cong. Record, 64th Cong., 1st Sess., Vol. 53, Part 2, P. 1117 5

Cong. Record, 66th Cong., 1st Sess., Vol. 58, Part 8, P. 7772 8

Cong., Record, 66th Cong., 2nd Sess., Vol. 59, Part 3, P. 2713 8

Statements by Mr. Walsh:

Cong., Record, 66th Cong., 1st Sess., Vol. 58, Part 4, P. 4112 4

Nos. 618, 676, 704, 743.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

UNITED STATES OF AMERICA EX REL. ETHEL M. McLENNAN, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES OF AMERICA EX REL. H. H. SIMPSON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

UNITED STATES OF AMERICA EX REL. ROY G. BARTON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR.

UNITED STATES OF AMERICA EX REL. W. B. PYRON, *Petitioner*,

v.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, and CHARLES C. MOORE, COMMISSIONER OF THE GENERAL LAND OFFICE.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

REPLY BRIEF OF WYOMING, COLORADO, UTAH, MONTANA AND NEW MEXICO.

The following statements appear on page 12 of Respondent's brief:

> "The briefs filed in support of numerous states require no answer inasmuch as the rights of the

states to royalties do not accrue until something is earned and received by the United States."

At pages 41 and 42:

> "The States of Utah, New Mexico, Colorado, Wyoming, and Montana asked and received permission to file briefs in behalf of the petitioners. The claim is made by these states that under Section 35 of the Leasing Act (pp. 48-49, *infra*) the State is to receive 37½ per cent of the royalties accruing to the Government from production of oil and gas on public lands within that State.
>
> "This *gratuity* depends on the contingency of discovery. There is not appropriated to these States any specific or definite sum, but the Act gives to the States 37½ per cent of the amounts realized under oil and gas leases, if, as, and when received by the United States from such leases. Consequently there is nothing due to the States until something is earned and received. That the *donation* is not based upon any vested right in the States is shown by the fact that in Section 35 of the Leasing Act all moneys accruing to the United States from oil and gas leases in the naval petroleum reserves are required to be deposited in the Treasury of the United States and retained by the United States." (Italics ours)

The position taken by the Respondents indicates that they are not familiar with the legislative history of the Leasing Act.

In the first quotation, it is stated that the briefs filed in support of the numerous States require no answer for the reason that the rights of the States to royalties do not accrue until something is determined and received by the United States. The right to royalties is not the only, or indeed the paramount

right which the States have in the question before the Court. The States do not appear as donees expecting gratuities from the Federal Government. They have a vital interest in the paramount issue involved; an interest greater than the petitioners and more important than any existing in favor of the Secretary of the Interior. The situation which prompts the states to appear here is not as stated in the brief of Respondents, to file a brief primarily in support of the contentions of the petitioners, but because a governmental policy, which has been operating satisfactorily to the States and in keeping with the purpose of the Leasing Act, has suddenly been overthrown by the Secretary of the Interior for the stated purpose of conserving oil and gas. This can hardly be the true purpose, for only 3 per cent of the oil produced in the United States comes from the Rocky Mountain States. Such production is not sufficient to meet their consumptive demands. The construction placed upon the Leasing Act during the past ten years by the manner in which it has been administered has been satisfactory to the States, and has been in keeping with their understanding of what would be done when the bill became a law.

Senator Walsh, of Montana, on August 21, 1919, when discussing this subject in the Senate, said:

> "* * * there is growing up a sentiment embryonic as yet I hope, that no disposition whatever should be made of the public lands containing these valuable mineral deposits, either by alienation or by lease; that they ought to be reserved altogether and be prospected and developed and operated by the Government. * * *
>
> "A great many of us have felt compelled,

with reference to this legislation, to yield something of our own views concerning what ought to be done in order to secure some development of these lands, and I suggest to the Senator that by opposing this measure he is serving the purpose of those who do not want any legislation on this subject at all, in the hope that the sentiment of which I have spoken will grow and develop until it will be impossible to get legislation of this character or of the character which he thinks ought to be enacted." (Congressional Record, 66th Cong., 1st Sess., Vol. 58, Part 4, Page 4112.)

That policy has been overthrown and in the departure therefrom the interest of the states in the industry which has grown up around the exploration of the public lands within the states, has been paralyzed. The Leasing Act has been suspended and in lieu thereof, the orders of the Secretary of the Interior have been set up as the policy which shall govern the development of the public lands in the discovery of oil and gas.

There is no logical basis in the language of the Act, for the construction contended for by the Secretary. The purpose of the Act was to promote, and stimulate, the exploration of the public domain in search of oil, gas and other minerals specified in the Act. A leasing bill affords the State and community an opportunity to benefit to a larger extent by the development, providing the community gets the rentals and royalties.

Hon. Frank W. Mondell, former Representative in Congress from Wyoming, as shown by the following references to the Congressional Record, successfully contended that the States should not be deprived of

the right to look to these lands as a source of taxation for revenue, and to partially reimburse the States for this loss, Section 35 of the Leasing Act, of which Mr. Mondell was the author, was incorporated in the Act.

In the Congressional Record 64th Congress, First Session, Vol. 53, Part 2, page 1117, Mr. Mondell said:

"The section as it stands provides that the royalty and rentals shall flow into the irrigation fund. My amendment provides for a division, one-half going to the State and one-half to the reclamation fund. It will be remembered that this is a radical departure from past legislation. Heretofore, we have disposed of the public lands and in due course of time they have passed into private ownership and become taxable, with all their values. We are now proposing to retain permanently from private ownership and taxation this valuable property of land and minerals.

"It is our opinion that one-half of the receipts from royalties and rentals will not more than recompense us for the actual loss in revenues through our inability to tax values retained in the hands of the Federal Government. If it were a matter of selling lands at a nominal price and then turning the money into the Federal Treasury, that would be one thing, because the land sold would become taxable and we would have an opportunity to support the institutions of government by taxing the lands. When, however, we retain the lands permanently in the hands of the Federal landlord and exact a heavy rental, to be determined by the Secretary of the Interior, surely there can be no one who has considered the matter carefully, not even my friend from Michigan, who believes that under such conditions these great rentals and royalties, running on forever, covering a large portion of the lands and resources of a State or of a community, should

all be taken out of the community, out of the State, even for so splendid a purpose as the reclamation of arid lands.

"* * * surely these communities are entitled to compensation for the loss that they must sustain to their revenues under this system; and, more than that, if there be any real, sound argument for the establishment *for* a public leasing system, its strongest pillar and support is the claim, the hope, the expectation that through such a system, with all of its annoyances, with all of its liability to check development, the community may secure larger benefits as time passes than would be secured under a system of private ownership. That is one of the strongest arguments in favor of a public leasing system. That argument goes for naught if the revenues thus received from the depletion of the resources of a State are taken beyond its borders and its people receive no benefit. The cost of the maintenance of government goes on. Roads must be built, schools must be maintained, while the revenues flowing from these enormous resources are going out of the community beyond the borders of the States, to be used for other purposes, the people left without funds or opportunity to develop their country. It seems to me this is a very fair provision. As a matter of fact, these States and communities should have all of these moneys. No other theory is consistent with our idea of government, and it is only because the reclamation fund is one contributing to the upbuilding of this same western country that we approve or agree to the proposition of half of it going into the reclamation fund."

The passing of this Act was recognized by the Congress as being a radical departure from the then established method and custom of disposing of the

public lands in the various states. Heretofore, the public lands have been disposed of and in due course of time they passed into private ownership and became taxable. The Leasing Act proposed to retain permanently from private ownership and taxation this valuable property of land and minerals. The position of the Federal Government is that of a trustee having the authority and duty to dispose of, the public lands as shown from the history of the legislation in question. The States in which these lands are located have an interest, which was that of knowing that in due course of time the title to these lands would be transferred by the Government to private ownership and constitute a source of taxation for revenue, which would enable the States to maintain their institutions of Government.

On October 30, 1919, Mr. Mondell further said:

> "Mr. Chairman, there should be no difference of opinion as to the rights of the States and their communities to be compensated for the great losses in taxing values which they will suffer by reason of holding perpetually in Federal ownership untaxed very great areas of land that will in time support large populations and require great outlay for the support of the institution of government. The only question that ever ought to be raised in this connection is as to what portion of the rents and royalties that will be received by the Government are necessary to compensate the States and their communities for their loss in taxing value. In the case of forest reserves, lands that do not entail great expense for administrative purposes, we give the States directly 25 per cent of the receipts to compensate for the losses which the State suffers by reason of its inability to tax these lands. We give 10 per cent

of those receipts for the building of roads on the reserves. We grant 10 per cent of those receipts to the fund to construct roads in cooperation with the communities on and off the reserve, so that 45 per cent of the receipts by the Federal Government from these reserved lands are paid directly to or used for purposes and expenditures which would otherwise have to be paid for by the community. The areas we are proposing to withhold from sale and taxation now are very much more valuable than the forest areas." (Cong. Record, 66th Cong., 1st Sess., Vol. 58, Part 8, page 7772.)

Over a period of ten years the question of how to accomplish the intent of Congress to create a new method of dealing with its public lands was before that body.

On February 10, 1920, Mr. Mondell said:

"We have been endeavoring for 10 years to secure legislation of this character, but this year for the first time the House has had before it a bill that is strictly a leasing measure. It therefore fulfills the desires and the expectations of those who, 10 or 12 years ago, began the agitation for what was known as the conservation of the mineral resources of the public lands. The proceeds of the rents and royalties obtained from the lands are to be divided between the States in which the minerals are produced to an extent intended to reimburse them for the loss of taxing values; the Government, with a view of covering the cost of administration; and the national reclamation fund." (Cong. Record, 66th Congress, 2nd Sess., Vol. 59, Part 3, page 2713.)

During that time, the question of what should be offered to the States in return for their giving up the

right of having the title to this land alienated by the Government to private ownership, was a vital one, and it was finally agreed that the States should have returned to them for public purposes 37½ per cent in value of the minerals produced and recovered from the lands within the respective states affected by this Act. This is neither a "gratuity" nor "donation" as stated by the Respondents in their brief. It is a solemn obligation due the States to partially compensate them for that right of taxation which they must of necessity surrender if the Government is to establish and work out its leasing policy for the development of oil and gas in the public mineral lands.

In the case of Haynes v. Smith, reported in 50 L. D. page 208, it is stated on page 211, of the opinion as follows:

> "The rights of an applicant for a prospecting permit for oil and gas under Section 13 of the Act of February 25, 1920, supra, pass on the death of the applicant to his or her personal representatives in the same way as other personal property."

Hence it is shown the States have an interest, which is more than that of a donee or recipient of a gratuity, and the Department of the Interior there recognized that the application for a prospecting permit was a property right.

And the proviso in Section 32 of said Act, in the following language:

> "That nothing in this act shall be construed or held to affect the rights of the States or other local authority to exercise any rights which they may have, including the right to levy and collect

> taxes upon improvements, output of mines, or other rights, property, or assets of any lessee of the United States,"

clearly shows that the taxing power existing in the states should not be surrendered or set aside except as to the mineral producing lands of the United States. The property of lessees of the United States should be subject to taxation by the States, even though located upon said tax exempt lands of the Federal Government.

The Leasing Act has been suspended by the orders of the Secretary of the Interior. He has presumed to dispense with an Act of Congress, and abrogate a solemn contract made by Congress with the oil producing States which have filed this Brief.

In Kendall v. United States, 12 Peters 612, 9 L. Ed. 1216, this court said:

> "It was urged at the bar that the Postmaster-General was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and this right of the President is claimed as growing out of the obligation imposed upon him by the Constitution to take care that the laws be faithfully executed. This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power which has no countenance for its support in any part of the Constitution, and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.
>
> "To contend that the obligation imposed on the

> President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible."

The States agree with the position of the Petitioners that the Secretary of the Interior has no legal right to deny consideration to their applications for prospecting permits and contend that aside from the lack of legality to support the action of the Secretary of the Interior, he has violated a moral obligation to carry out the intention of the Congress as expressed in the Leasing Act.

EXECUTIVE AUTHORITY TO WITHDRAW FROM PRIVATE APPROPRIATION PORTIONS OF THE PUBLIC DOMAIN.

From Pages 27 and 28 of Respondents' Brief we quote as follows:

> "We maintain that the President had the power to withdraw the lands
>
> (1) Entirely apart from any statutory authority and
>
> (2) By virtue of the express provisions of the Act of June 25, 1910."

and Respondents rely upon the Midwest case wherein the Court said that the practice of withdrawals of public lands both mineral and nonmineral from *private appropriation* by the President without special authority from Congress dates from an early period in the history of the country. With that statement we take no issue but it does not support the position of the Respondents in this controversy.

The Act of June 25, 1910, gave to the President authority to withdraw public lands temporarily from *settlement, location, sale or entry.*

It is significant to note that the purpose justifying the action of the Executive was to prevent the title to public lands passing out of the control of the Federal Government and into private ownership. So that in neither of these sources of authority is there found a justification for the present action of the Secretary. The purpose of the Leasing Act as stated by this court in Wilbur v. Krushnic, 280 U. S. 306-319, was:

> "The Leasing Act of 1920 effected a complete change of policy in respect of the disposition of lands containing deposits of coal, phosphate, sodium, oil, oil shale, and gas. Such lands were no longer to be open to location and acquisition of title, but only to lease."

Therefore, whatever may have been the implied power of the Executive prior to 1910, to temporarily withdraw the public land for private appropriation or whatever may have been his authority under the Act of June 25, 1910, to make such withdrawal, constitute neither a justification for the attempted exercise of said right after the Act of February 25, 1920. This latter Act is all inclusive. It is a complete withdrawal of all the lands affected by said Act from alienation of title by the Federal Government. There can be no withdrawal by the Executive of the lands by implied power or by statutory authority. That is forever prohibited by the terms of the Leasing Act.

An attempt to withdraw would be a vain jesture because no title, no right of possession, no interest

could be acquired in any public land without consent of the Federal Government.

The statutory authority for withdrawals of public domain under the provisions of the Act of June 25, 1910, is well stated in State of Utah v. Lichliter, 50 Land Decisions, page 236, in the following language:

> "The Act of June 25, 1910 (36 Stat. 847), pursuant to which the land now involved was withdrawn, was formal congressional recognition of this power and was intended as a limitation thereof rather than a grant of greater authority. (United States v. Midwest Oil Co. (236 U. S. 459)."

Assuming that this Act of June 25, 1910, as intimated by the language found on pages 28 and 29 of Respondent's brief is ambiguous, nevertheless the President has consistently followed the procedure prescribed in said Act since its adoption, relating to withdrawals and so had construed the Act as providing the exclusive authority for the same. In all cases of ambiguity, the contemporaneous construction of Departments and officials whose duties it is to carry the law into effect is universally held to be controlling.

Fairbanks vs. United States, 21 Sup. Ct. 649, 181 U. S. 283-45 Law Ed. 862.

United States vs. Midwest Oil Company, 236 U. S. 473, 59 Law Ed. 681, 35 Sup. Ct. 309.

CONSERVATION OF OIL AND GAS BY CONGRESS.

Much is said in the Respondents' brief on the orders of the Secretary being conservation in the public interest. The orders are directed against the Discovery of oil and gas by refusing to issue permits and not to the conservation of these minerals after they are found to exist. The conservation policy of Congress is defined in the Act of March 4, 1931, not in amending Section 13 relating to granting of permits but Sections 17 and 27 relating to permits and leases after discovery is made:

> "The Secretary of the Interior is authorized whenever he shall deem such action necessary or in the public interest, with the consent of lessee, by order to suspend or modify the drilling or producing requirements of any oil and gas lease heretofore or hereafter issued, and no lease shall be deemed to expire by reason of the suspension of production pursuant to any such order. * * *
>
> And provided further, that for the purpose of more properly conserving the natural resources * * * permittees and lessees * * * may unite with each other * * * in collectively adopting and operating under a cooperative or unit plan of development * * * whenever determined and certified by the Secretary of the Interior to be necessary or advisable in the public interest. * * *." (Public No. 853, 71st Congress.)

The Act of the Secretary in refusing to follow the plain mandate of the Leasing Act, to promote and stimulate the discovery of oil and gas in the public domain, is not effecting a withdrawal of any public

lands but is attempting to withdraw the congressional Act itself.

Respectfully submitted,

STATE OF WYOMING,
By: J. A. Greenwood,
Its Attorney General.

STATE OF COLORADO,
By: Clarence L. Ireland,
Its Attorney General.

OF COUNSEL:
PETER Q. NYCE.

STATE OF MONTANA,
By: L. A. Foot,
Its Attorney General.

STATE OF UTAH,
By: George P. Parker,
Its Attorney General.

STATE OF NEW MEXICO,
By: E. K. Neumann,
Its Attorney General.